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Nos. 01-10873, 02-5034

IN THE

Supreme Court of the United States

KHANH PHUONG NGUYEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TUYET MAI THI PHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the judgment of a United States Court of Appeals is rendered invalid by the participation of a non-Article III judge on that panel.

LIST OF PARTIES

All parties to the proceeding are listed in the caption of the case.

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OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 284 F.3d 1086, and is reproduced in the Petition Appendix.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2002. The petition for a writ of *certiorari* in 01-10873 was filed on May 29, 2002, and the petition for a writ of *certiorari* in 02-5034 was filed on June 18, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant provisions of Article I, Article III, and Article IV of the United States Constitution are reproduced at Appendix ("App.") 1a-2a. Relevant provisions of Title 28 of the United States Code are reproduced at App. 3a-5a.

STATEMENT OF THE CASE

This case implicates fundamental principles in the structure of our federal court system that are embodied in Article III of the Constitution. The Ninth Circuit panel that heard the appeal below included an Article IV territorial judge[1] who is unprotected by the tenure and salary guarantees of Article III. By permitting a non-Article III judge to sit on an Article III

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[1] "Article IV judges" occupy judgeships created pursuant to Congress's power under Article IV of the Constitution to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Article IV courts are one variety of "non-Article III courts" (also known as "legislative Courts," *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 546 (1828)). Other examples include "Article I courts" such as the Court of Veterans Appeals and the Tax Court, and administrative agencies.

court, the Ninth Circuit acted outside the bounds of the federal statute that authorizes judges to sit by designation. Were the statute interpreted to permit such an arrangement, it would unconstitutionally undermine Article III's structural protections and circumvent the Appointments Clause, thereby violating the constitutionally-mandated separation of powers.

Petitioners Khanh Phuong Nguyen and Tuyet Mai Thi Phan were tried and convicted in the District Court of Guam of three offenses related to a charged conspiracy to smuggle drugs. 284 F.3d at 1089. The trial was presided over by Judge John S. Unpingco of the District Court of Guam, an Article IV judge. *Id.* at 1086.

Following entry of judgment, petitioners appealed their convictions to the Ninth Circuit which, pursuant to 28 U.S.C. § 1294(4), hears appeals from the District Court of Guam. The appeals, however, were not heard by a legally constituted panel of the Ninth Circuit. Instead, the Ninth Circuit had scheduled a week-long special sitting in Guam and the Northern Mariana Islands that included Article IV territorial judges. JA 7-12. Thus, Ms. Nguyen's and Ms. Phan's appeals were heard in Guam before a panel composed of two Ninth Circuit judges, Chief Judge Schroeder and Senior Judge Goodwin, and a territorial judge sitting by designation, Judge Alex Munson of the District Court for the Northern Mariana Islands. 284 F.3d at 1087.[2]

Two days later, a slightly modified panel heard cases in the Northern Mariana Islands. For these cases, Judge Unpingco sat by designation with Judges Schroeder and Goodwin, reviewing the opinions of Judge Munson. JA 8.[3]

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[2] Petitioner Phan waived argument, but her case was decided by the same panel. 284 F.3d at 1086; JA6.

[3] Those cases included a Title IX sexual harassment claim, *Oden* v. *Northern Marianas College*, 284 F.3d 1058 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3021 (U.S. June 20, 2002) (No. 01-1865); claims arising under 42 U.S.C. § 1983 for violations of the Fourth, Sixth and

In March 2002, the panel affirmed the convictions of Nguyen and Phan. 284 F.3d at 1087.

SUMMARY OF ARGUMENT

This case, although it directly affects only a handful of litigants, has profound implications for the constitutional design of the federal court system. The Chief Judge of the Ninth Circuit, an Article III court, designated Article IV judges to sit on that court. This action rendered the actions of the panel *ultra vires*, for three separate reasons. First, the designation was unauthorized by 28 U.S.C. § 292, the statute that governs sittings-by-designation. Second, even if it were permitted by that statute, the designation violates the constitutional command that the Article III judicial power be vested in judges with life tenure and a guaranteed salary. Third, the Chief Judge's decision to designate an Article IV judge to sit on an Article III court violates the Appointments Clause. For each of these reasons, the judgment of the Ninth Circuit should be vacated and remanded.

1. There is no statutory authorization for a judge of the District Court for the Northern Mariana Islands to sit by designation on the Ninth Circuit. Title 28 contains numerous provisions regarding sittings-by-designation, see 28 U.S.C. §§ 292-297, but none of them permits Article IV judges to sit by designation. The only section that is arguably applicable, 28 U.S.C. § 292(a), is defined by reference to a list that *omits* the Northern Mariana Islands as well as Guam. Under the plain meaning of this statute, then, the designation that occurred here was unlawful. This conclusion is confirmed by the numerous instances in which Congress has distinguished

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Fourteenth Amendments, *Ayuyu* v. *Tagabuel*, 284 F.3d 1023 (9th Cir. 2002); a claim under Title VII alleging retaliatory discharge, *San Nicolas* v. *Department of Public Safety*, 31 Fed. Appx. 496 (9th Cir. 2002) (mem.), *available at* 2002 WL 460151; and a commercial dispute, *Dateline Exports, Inc.* v. *Basic Construction, Inc.*, 306 F.3d 912 (9th Cir. 2002) (per curiam).

federal district court judges in Article III courts from judges in the Northern Mariana Islands, Guam, and the Virgin Islands. Finally, this conclusion is supported by the canon of constitutional avoidance, for a contrary interpretation of this statute would raise serious constitutional questions concerning the structure of the Federal Judiciary.

2. If this Court does address those significant constitutional questions, only one answer is possible: The designation of Judge Munson to sit on the Ninth Circuit violated the structural constitutional guarantees embodied in Article III.

In order to ensure judicial independence, the Constitution endows judges of Article III courts with lifetime tenure and a salary that Congress cannot diminished. This constitutional mandate operates in straightforward fashion: All Article III judges possess these attributes, and only judges that possess these attributes may exercise Article III judicial power. An adjudicator who lacks these essential qualities may be termed a "judge," but may not exercise the Article III judicial power.

Judge Munson is not endowed with these protections, and is not an Article III judge. The court on which he sits, the District Court for the Northern Mariana Islands, is a territorial court, created by Congress pursuant to its plenary power over the territories. U.S. Const. art. IV, § 3, cl. 2. A judge of this court serves a ten-year term, may be removed by the President for cause, and his salary is not constitutionally protected from diminishment.

In this case, the panel of the Ninth Circuit—a court that is indisputably constituted pursuant to Article III—included Judge Munson, who is not endowed with Article III guarantees. Judge Munson heard argument, participated in the decisionmaking process, and participated in rendering judgment. The Constitution simply does not permit a non-Article III official to stand in the shoes of an Article III judge. Accordingly, the judgment of the panel is void.

This result is confirmed by the cases in which this Court has considered the boundaries of Article III vis-à-vis non-Article III officers. In the course of evaluating non-Article III entities, as well as "adjuncts" to Article III courts, this Court repeatedly has recognized that the "essential attributes of judicial power" must be retained by Article III judges and Article III courts. Where excessive power is granted to non-Article III officials—whether in the form of excessive jurisdiction, excessive authority, or inadequate supervision by Article III judges—such a delegation of power is unconstitutional. Here Judge Munson exercised full Article III powers. He assumed the role of an Article III judge on an Article III court of appeals. This Court's precedents plainly prohibit such a designation.

This analysis is fully consistent with the fact that Congress has plenary power over the territories, for the simple reason that this case does not concern a territorial court. Congress, it is true, has broad authority under Article IV to regulate the territories and the territorial courts. Here, Congress conferred upon the Ninth Circuit the jurisdiction to hear territorial appeals. Once jurisdiction is conferred upon an Article III court, the protections of Article III attach—just as they do whenever an Article III court exercises judicial power. This analysis is analogous to the principles that govern Congress's control over the "inferior" federal courts. Congress need not create lower federal courts, but once it does, the mandates of Article III come into play. Likewise, Congress need not have assigned jurisdiction over appeals from the District Court of Guam to the Ninth Circuit, but once it did, Article III places limitations on the composition of Ninth Circuit panels that may hear these cases. For this reason too, the judgment of the Ninth Circuit should be vacated.

3. The Chief Judge of the Ninth Circuit's designation of Judge Munson to sit on that court also violated the Appointments Clause. That Clause specifies that only the President may appoint "principal officers," which include

judges of the federal appeals courts. Here, however, the Chief Judge of the Ninth Circuit appointed Judge Munson to sit as a member of that court.

It is no answer that Judge Munson was previously nominated by the President and confirmed by the Senate, because his nomination and confirmation were to a different position than the one he occupied here. This Court has recognized that the confirmation of an official to one position does not permit him to assume a second, separate position without presidential reappointment. Rather, an already-appointed officer may only assume new duties without reconfirmation if the new duties are "germane" to his existing office. Here, however, Judge Munson assumed the duties of a wholly different office. Sitting on the Ninth Circuit is not "germane" to serving as a territorial judge in the Pacific Islands. Although both jobs are performed under the generic title "judge," they stem from entirely different constitutional authority, and the duties of the territorial judge have never been thought to encompass the Article III function. Nor could they, for neither Title 28 nor Article III permits Article IV territorial judges to exercise Article III authority.

4. For all of these reasons, the judgment of the Ninth Circuit must be vacated. This Court has long recognized that statutory defects in the composition of an appellate panel render the actions of that court "void." Moreover, this Court has repeatedly held that defects in judicial authority under Article III, Section 1 and the Appointments Clause are quasi-jurisdictional in nature, for they go "to the validity of the very proceeding under review." *Freytag* v. *Comm'r*, 501 U.S. 868, 898, 914 (1991) (Scalia, J., concurring in part and concurring in judgment). Accordingly, the Court need not apply "plain error" analysis; the judgment must simply be vacated.

Even were plain error analysis appropriate, the error that occurred in this case satisfies that test. For all of the reasons set forth above, the decision of the Chief Judge of the Ninth Circuit to permit a non-Article III judge to hear cases as a

member of that court was error, and obviously so. Accordingly, the first two prongs of the plain error test are met. Furthermore, given its serious and structural nature, the error substantially affected petitioners' rights, and calls into question the "fairness, integrity or public reputation" of the proceedings. *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). This Court has previously treated a claim that a non-Article III officer sat on an Article III court as a structural error, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-36 (1962) (plurality op. of Harlan, J.), just as it has treated errors under the Appointments Clause, *Freytag*, 501 U.S. at 878-79.

Such an approach is confirmed by the cases in which this Court has treated defects in the composition of an appellate panel as "void," and by the inapplicability of the *de facto* officer doctrine—a doctrine that applies to minor defects in court administration, and that specifically does *not* apply to serious errors like the one that occurred here. Finally, treating this error as a structural error is recommended by the practical impossibility of determining whether the presence of an unlawful adjudicator affected the decisionmaking process. Accordingly, the plain error test is satisfied, and this case should be vacated and remanded for rehearing before a properly-constituted three-member panel of the Ninth Circuit.

ARGUMENT

I. CONGRESS HAS NOT AUTHORIZED JUDGES FROM THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS TO SIT BY DESIGNATION ON ARTICLE III COURTS.

A. The Plain Meaning Of 28 U.S.C. § 292(a) Precludes The Designation Of A Judge From The District Court For The Northern Mariana Islands To Sit On The Ninth Circuit.

Congress has carefully circumscribed when, and under what circumstances, a judge may be designated to sit on a

court other than the one to which he was appointed. See 28 U.S.C. §§ 291-297. Nothing in Title 28 permits a judge of the District Court for the Northern Mariana Islands to sit by designation on the Ninth Circuit.

Section 292(a) states plainly that "district judges" may be designated to sit on the court of appeals within their circuit:

> The chief judge of a circuit may designate and assign one or more *district judges* within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.

Id. § 292(a) (emphasis added). However, a judge of the District Court for the Northern Mariana Islands does not fall within the term "district judge" as defined in Title 28.

Title 28 defines the term "district" as "the districts enumerated in Chapter 5 of [Title 28]." *Id.* § 451. Chapter 5, in turn, contains two sets of provisions that identify the "district judges" and the "judicial districts." Section 133(a) lists the "district judges" to be appointed by the President. See *id.* § 133(a) ("The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows: ...."). It enumerates the districts contained within all 50 states and Puerto Rico. *Id.* The Northern Mariana Islands do not appear on this list.

Similarly, the "judicial districts" are set forth in §§ 81-131. Again, as with § 133(a), these sections list one or more districts for each of the 50 states, as well as for Puerto Rico. 28 U.S.C. §§ 81-131. And again, the Northern Mariana Islands are omitted.[4]

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[4] Nor do Guam or the Virgin Islands appear on these lists. Accordingly, the district courts of those territories are similarly situated to the District Court for the Northern Mariana Islands for purposes of § 292. As non-Article III courts, they are likewise similarly situated for purposes of Article III and the Appointments Clause. *See infra* Sections II, III.

In fact, not only is the District Court for the Northern Mariana Islands excluded from the terms "district" and "district court" as defined by § 451, it does not even fall within the broader term "court of the United States," which is defined to include "the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress *the judges of which are entitled to hold office during good behavior*." 28 U.S.C. § 451 (emphasis added); cf. also Fed. R. Crim. P. 1(b)(3) (defining "Federal judge" for purposes of the Federal Rules of Criminal Procedure; separately enumerating "judge of the United States" as defined in § 451, and territorial judges).

As a simple definitional matter, then, § 292(a) does not provide for judges from the Northern Mariana Islands to sit by designation on the Ninth Circuit. Where, as here, Congress defines the terms it uses in a particular statute, that definition is binding. *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000) ("[w]hen a statute includes an explicit definition, we must follow that definition"); see 1A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 20:8, at 132 (6th ed. 2002); 2A *id.* § 47:07, at 227-28. Because judges from the District Court for the Northern Mariana Islands are not "district" judges for purposes of Title 28, they may not sit by designation on the Ninth Circuit.

On at least one occasion, Congress has confirmed its understanding that such judges are not included within the definitional provisions of § 451. In 1977, two years after adopting the Covenant to Establish the Commonwealth of the Northern Mariana Islands, Congress enacted legislation to create the District Court for the Northern Mariana Islands. Pub. L. No. 95-157, 91 Stat. 1265 (1977) (codified as amended at 48 U.S.C. §§ 1821-1826). Congress expressly specified that judges from the District Court of Guam could sit by designation on the District Court for the Northern

Mariana Islands. 48 U.S.C. § 1821(b)(2). Its reason for doing so is instructive:

> Since the District Court of Guam is not a "district court" as technically defined in 28 U.S.C. 451, it is necessary to specifically include a judge of the District Court of Guam as one of the judges which may be assigned by the chief judge of the ninth circuit to serve temporarily as a judge of the District Court of the Northern Mariana Islands.

S. Rep. No. 95-475, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3307, 3307. Congress could not have been clearer: Courts of Guam are not "district courts" for purposes of § 451. Accordingly, the judges of those courts cannot fall within the designation provisions of § 292. And, because the District Court of Guam and the District Court for the Northern Mariana Islands are treated the same for purposes of Title 28, see 48 U.S.C. § 1824(b), this is strong additional evidence that the District Court for the Northern Mariana Islands is not encompassed within § 451, and therefore not within § 292.

Given Congress's exhaustive listing in § 451 of the "districts," there have been few occasions for courts to interpret the term. On those few occasions, however, both Article III and territorial courts have adopted precisely the reasoning set forth above, concluding that the term "district" does not encompass territorial courts excluded from § 451. In *Government of the Virgin Islands* v. *Gereau*, the Third Circuit was confronted with the question whether the federal trial court in the Virgin Islands is a "district" for purposes of Title 28. 502 F.2d 914 (3d Cir. 1974). It looked to § 451, found that the Virgin Islands did not appear in the list of districts enumerated in Chapter 5 of Title 28, and concluded that the trial court in the Virgin Islands was not a "district court" for purposes of Title 28. *Id.* at 931. Likewise, in *Callwood* v. *Callwood*, the federal court in the Virgin Islands observed that:

> [t]he two sets of Federal courts have long been distinguished as Constitutional Courts of the United States and Legislative Courts in the territories created by act of Congress, and thus the words "District Court" as used throughout Title 28 have been clearly defined in Section 451 to mean only the former, except where such provisions have been made specifically applicable to the latter.

127 F. Supp. 179, 181 (D.V.I. 1954).

This Court has reasoned likewise, in an analogous context. In *Mookini* v. *United States*, the Court held that the then-territorial District Court of Hawaii was not a "United States District Court" for purposes of the Criminal Appeals Rules. 303 U.S. 201 (1938). The Court's analysis confirmed the approach set forth above. Specifically, it stated that in the absence of a specific provision to the contrary, the phrase "'District Courts of the United States,' .... describes the constitutional courts created under Article III of the Constitution." *Id.* at 205. This is the case because "[c]ourts of the Territories are legislative courts, and are not District Courts of the United States." *Id.*[5]

The plain meaning of § 292, as illuminated by the definitional provisions that govern it, is that only judges who are designated as "district judges" under Title 28 may sit by designation on appellate panels. Judge Munson may be denominated a "judge," but he is not a "district judge" for

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[5] *Accord Talbot* v. *McCarrey*, 218 F.2d 565, 566 (9th Cir. 1954) (Alaska District Court is not a "'court of the United States'"); *Wells* v. *United States*, 214 F.2d 380, 382 (5th Cir. 1954) (District Court for the Canal Zone is not a "district court": "[T]he term 'district courts' means only those courts which are created under Article III of the Constitution and which are constituted by Chapter 5 of Title 28.") Today, the Federal Rules of Criminal Procedure specifically enumerate—and thereby also distinguish—"United States district courts," the "district court of Guam" and the "district court for the Northern Mariana Islands." Fed. R. Crim. P. 1(a).

purposes of Title 28. Cf. *Gereau*, 502 F.2d at 931 (noting that "the mere appellation 'district court'" does not mean that a court is such for purposes of Title 28). The decision by the Chief Judge of the Ninth Circuit to authorize Judge Munson's designation was therefore unlawful on its face.

B. There Are Numerous Other Indications That Congress Intended To Exclude The Northern Mariana Islands From The Definitional Provisions Of 28 U.S.C. § 451.

Even if the definitional provisions of § 451 were less than plain, there are numerous other provisions in the United States Code demonstrating that Congress deliberately excluded judges of the District Court for the Northern Mariana Islands from Title 28's definition of "district judges."

1. At least one jurisdiction other than a State is encompassed within § 451, creating the strong inference that the exclusion of the Northern Mariana Islands from § 451 was deliberate. Congress included Puerto Rico in the definitional provisions of Title 28. Like the Northern Mariana Islands, Guam and the Virgin Islands, Puerto Rico is not a State. Yet Title 28 treats the District of Puerto Rico as a "judicial district," 28 U.S.C. § 119, and the judges of the District of Puerto Rico as "district judges," *id.* § 133(a). The inclusion of Puerto Rico can only mean that the exclusion of the other territories from § 451—including the Northern Mariana Islands—was deliberate. See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius.*").

Similarly, although the District Court for the Northern Mariana Islands is excluded from the definitional provisions of § 451, it is specifically governed by 28 U.S.C. §§ 452-459 and 462. See 28 U.S.C. § 460(a) (applying §§ 452-459 and 462 to "each court created by Act of Congress in a territory which is invested with any jurisdiction of a district court"). The fact that the District Court for the Northern Mariana

Islands is governed by these provisions immediately adjacent to § 451 is additional evidence that Congress meant to treat it differently from Article III courts for purposes of § 451.

2. Further evidence that Congress does not perceive the District Court for the Northern Mariana Islands to be an Article III federal district court is the fact that Congress did not vest the judges of that court with lifetime tenure—a requirement of Article III, see U.S. Const. art. III, § 1—but instead granted them a term of ten years. It must be presumed that, in creating those courts, Congress was aware that Article III mandates lifetime tenure for Article III judges. *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 696-97 (1979) (Congress is presumed to "know the law"). This presumption applies with even greater force where, as here, unambiguous, foundational constitutional commands are at issue.

Thus, in conformance with the requirements of Article III, Congress has provided that "district judges" hold office "during good behavior." 28 U.S.C. § 134(a). In sharp contrast, judges from the Northern Mariana Islands hold office only for a statutorily-specified term of ten years. 48 U.S.C. 1821(b)(1). Moreover, judges from the Northern Mariana Islands can be removed from office at any time by the President alone for cause. *Id.* The statute requires no congressional ratification or other action. These are unmistakable indications that Congress understands the District Court for the Northern Mariana Islands to be a non-Article III court. See *United States* v. *Lewis*, 456 F.2d 404, 408 (3d Cir.1972) (holding that District Court of the Virgin Islands is not a "district court" because, among other reasons, its judges serve a statutorily-defined term of years).

Indeed, throughout Title 28 Congress consistently distinguishes between the federal district courts, on the one hand, and the courts in the Northern Mariana Islands, Guam and the Virgin Islands, on the other. Thus, 28 U.S.C. § 631, which governs the selection of magistrate judges, enumerates these courts separately. *Id.* ("The judges of each United

States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall appoint United States magistrate judges....") Moreover, § 631 continues, "[i]n the case of a magistrate judge appointed by the district court of the Virgin Islands, Guam, or the Northern Mariana Islands, this chapter shall apply *as though the court appointing such a magistrate judge were a United States district court*." *Id.* (emphasis added). Similarly, these territorial courts are expressly differentiated from the federal district courts in provisions regarding annuities for judges' surviving family members, compare *id.* § 376(a)(1)(A) with *id.* § 376(a)(1)(B); in provisions governing the salaries of judges upon retirement, compare *id.* § 371 with *id.* § 373; and in numerous other provisions throughout Title 28, see, *e.g.*, *id.* §§ 333, 610, 753, 1291, 1292(a)(1), 1346(b)(1).

Thus, even aside from the plain meaning of § 292, there is abundant evidence throughout the United States Code that Congress did not intend to include the District Court for the Northern Mariana Islands within that provision. The decision to designate a judge from that court to sit on the Ninth Circuit was therefore plainly outside the bounds of the designation statute.

C. The Doctrine Of Constitutional Avoidance Cautions Against Interpreting § 292 To Permit Article IV Territorial Judges To Sit On Article III Courts.

Even if the question presented could not be so easily answered by simple reference to § 292 and § 451, this Court should construe § 292 to forbid the type of designation made here, in order to avoid the constitutional difficulties that would result from a contrary interpretation.

Pursuant to the well-established doctrine of constitutional avoidance, this Court construes ambiguous statutes to avoid difficult constitutional questions: "[W]here a statute is

susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex rel. Attorney Gen.* v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). This duty is especially pronounced in the Article III realm, given the "inherent complexity" of Article III questions. See *Peretz* v. *United States*, 501 U.S. 923, 949 (1991) (Marshall, J., dissenting); cf. *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment) ("[p]articularly in an area of constitutional law such as that of 'Art. III Courts,' ... rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy").

Here, a construction of § 292 that would permit Article IV territorial judges to sit by designation on Article III courts would raise precisely the type of grave and doubtful constitutional questions that the doctrine is designed to avoid. (Indeed, as set forth below, permitting such designations plainly would violate the structural guarantees inherent in Article III and further, would violate the mandates of the Appointments Clause. See *infra* Sections II, III.) Accordingly, even were § 292 ambiguous, this Court should construe the statute to forbid Article IV territorial judges from sitting by designation on Article III courts, in order to avoid the difficult constitutional questions that would be posed by a contrary interpretation of the statute.

II. DESIGNATING AN ARTICLE IV TERRITORIAL JUDGE TO SIT ON AN ARTICLE III COURT VIOLATES THE STRUCTURAL GUARANTEES EMBODIED IN ARTICLE III.

Whether or not Congress meant to permit territorial judges to sit on Article III courts, the decision to permit such an arrangement in this case runs afoul of the structural protections contained in Article III. Simply put: When a case

is to be decided by an Article III court, the Constitution requires that it be decided by Article III judges with the full panoply of Article III protections.

This Court has only once confronted whether non-Article III judges may sit on Article III courts, and indicated that such an arrangement is flatly impermissible. In *Glidden*, the Court considered two consolidated cases, in one of which a judge from the United States Court of Claims had sat by designation on the Second Circuit. 370 U.S. at 532 (plurality). The Court clearly stated that Article III courts must be staffed with judges that enjoy "constitutional independence." *Id.* at 538 (plurality) ("the question whether [the judge] enjoyed constitutional independence is inescapably presented"). Furthermore, the Court noted, "the necessity for [an Article III] judge is uncontested." *Id.* at 537 (plurality); *id.* at 597, 604-05 (Douglas, J., dissenting) ("no one would go so far as to say that a member of the Interstate Commerce Commission could be assigned to sit on the District Court or on the Court of Appeals"; discussing at length the distinction between Article III judges and non-Article III officials).

Congress, likewise, has repeatedly demonstrated its understanding that Article I judges may not sit on Article III courts. On several occasions in the 1950s, Congress declared courts—that previously had been deemed to fall within Article I—to be Article III courts.[6] Among Congress's

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[6] See Act of Aug. 25, 1958, Pub. L. No. 85-755, §§ 1, 4, 72 Stat. 848, 848-49; S. Rep. No. 85-2309 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3909, 3909 (declaring the Court of Customs and Patent Appeals to be an Article III court, among other reasons, so that its judges could sit by designation on the federal district and circuit courts); Act of July 14, 1956, ch. 589, §§ 1, 3, 70 Stat. 532, 532; H.R. Rep. No. 84-2348 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3122, 3122-23 (same; Customs Court); Act of July 28, 1953, ch. 253, 67 Stat. 226; H.R. Rep. No. 83-695, at 3, 5-6 (1953) (same; Claims Court). These statutes led to the sittings-by-designation that were at issue in *Glidden*.

purposes for doing so was to enable those judges to sit by designation on Article III courts. The implication, of course, was that so long as they were non-Article III judges, these officials could not sit by designation on Article III courts.

And, as a matter of historical practice, the designation of a non-Article III territorial judge to sit on a Federal Court of Appeals is all but unheard-of, despite a history of judicial innovation dating back to the Judiciary Act of 1789. Over the years, Congress and the courts have employed numerous structures for accomplishing the judicial business of the United States. These include courts delimited by geography and subject area; the creation of judicial "adjuncts," such as magistrates and bankruptcy judges; and the use of court officials, such as special masters and appellate commissioners. See generally Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 Geor. L.J. 607 (2002). Article III judges have long been permitted to sit on other Article III courts,

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A similar implication arises out of the reorganization of the federal trade and patent courts in the early 1980s. As new courts were created, provision was made for Article III judges—but not Article I judges—to sit by designation on Article III courts. Thus, when Congress reconstituted the United States Customs Court as the Court of International Trade, *see* Customs Court Act of 1980, Pub. L. No. 96-417, sec. 101, § 251, 94 Stat. 1727, 1727, an Article III court, its judges were expressly permitted to sit by designation on other Article III courts, 28 U.S.C. § 293. Likewise, when Congress abolished the United States Court of Claims and the United States Court of Customs and Patent Appeals, and transferred their judges and much of their jurisdiction to the new Federal Circuit, an Article III court, *see* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 105, 127, 165, 96 Stat. 25, 28, 37-39, 50 (codified as amended in scattered sections of 28 U.S.C.), its judges, too, were expressly permitted to sit by designation, *see* 28 U.S.C. § 291(a). In notable contrast, the 1982 enactment that created the United States Claims Court (now called the Court of Federal Claims), *see* Pub. L. No. 97-164, § 105, 96 Stat. at 27-28, specifically designated it an Article I court, 28 U.S.C. § 171, and made no provision for its judges to sit by designation on Article III courts.

Lamar v. *United States*, 241 U.S. 103, 118 (1916); *Stuart* v. *Laird*, 5 U.S. (1 Cranch) 299, 308 (1803), and Article I judges have sat by designation on other Article I courts, *e.g.*, Act of Sept. 14, 1922, ch. 306, sec. 5, § 18, 42 Stat. 837, 839 (codified at 28 U.S.C. § 22 (1925)) (authorizing judges from the Court of Customs Appeals to sit by designation on the local courts of the District of Columbia).

Yet, despite this extensive history of innovation in the judiciary, courts other than the Ninth Circuit have exercised steadfast care in hewing to the important distinction between Article III judges and others. The historical record indicates that only in the Ninth Circuit have non-Article III judges (whether Article IV territorial judges, or otherwise) sat by designation on an Article III court.[7] The Third Circuit has not permitted judges from the District Court of the Virgin Islands to sit by designation, nor does the Fifth Circuit appear to have extended that opportunity to judges from the District of the Canal Zone. The uniqueness of the current situation is unsurprising, given the clarity of the constitutional principles at work.

A. Non-Article III Judges May Not Exercise Article III Judicial Power.

To guarantee the independence of the judiciary, and thereby protect its place in the constitutional system of checks and balances, Article III judges are endowed with life tenure and a guaranteed salary. These judges thereby possess institutional independence, and are entrusted with Article III judicial power. Here, however, a judge not protected by these

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[7] Other than the February 2002 sitting that gave rise to the instant case, the Ninth Circuit appears to have permitted Judges Wiig and McLaughlin of the United States District Court for the Territory of Hawaii to sit by designation in a handful of cases in the 1950s. *E.g.*, *Irish* v. *United States*, 225 F.2d 3 (9th Cir. 1955) (Wiig); *Chernekoff* v. *United States*, 219 F.2d 721 (9th Cir. 1955) (McLaughlin).

guarantees exercised Article III power. The Constitution forbids such an arrangement.

It is axiomatic that an independent judiciary plays a critical role in the constitutional system of checks and balances. *N. Pipeline*, 458 U.S. at 60 (plurality op. of Brennan, J.) ("our Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary"); *Evans* v. *Gore*, 253 U.S. 245, 249-53 (1920), *overruled on other grounds*, *United States* v. *Hatter*, 532 U.S. 557 (2001); see also *The Federalist* No. 78, at 438 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution.").

The Constitution's primary mechanism for guaranteeing judicial independence is the endowment of Article III judges with life tenure and an undiminished salary. U.S. Const. art. III, § 1; *The Federalist* No. 79, at 442 (Alexander Hamilton) ("Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."). These foundational protections predate the founding of our nation, arising out of grievances against King George III. *The Declaration of Independence* para. 11 (U.S. 1776) ("HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."). As the judiciary's primary bulwark against encroachment by the other branches of government, these protections are indispensable to the constitutional design:

> Article III, § 1, establishes a broad policy that federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation. These requirements protect the role of the independent judiciary within the constitutional scheme of tripartite government and assure impartial adjudication in federal courts.

Thomas v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582-83 (1985); *accord United States* v. *Will*, 449 U.S. 200, 217 (1980) ("the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary"); *The Federalist* No. 78, at 437 ("The standard of good behavior for the continuance in office of the judicial magistracy .... is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.").

Here, those guarantees were not in place. Because the District Court for the Northern Mariana Islands is a territorial court, see *Guam* v. *Olsen*, 431 U.S. 195, 196 n.1 (1997) (noting that the District Court of Guam was created under Article IV), Congress's power over it is plenary, see U.S. Const. art. IV, § 3, cl. 2,[8] and the Constitution accordingly guarantees Judge Munson neither life tenure nor an undiminished salary. *McAllister* v. *United States*, 141 U.S. 174, 188 (1891) ("the tenure by which the judges of [territorial] courts shall hold their offices, the salary they receive and the manner in which they may be removed or suspended from office, was left, by the Constitution, with Congress under its plenary power over the Territories of the

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[8] This Court has reaffirmed Congress's plenary power over the territories numerous times. *E.g.*, *The "City of Panama,"* 101 U.S. (Otto) 453, 459 (1879) ("in legislating for the territories, Congress exercises the unlimited powers of the general and of a State government"); *Canter*, 26 U.S. (1 Pet.) at 546 (referring to Congress's "general powers ... over the territories of the United States"); *see generally McAllister*, 141 U.S. at 180-85 (summarizing early cases). In light of this power, this Court has held, the Constitution has only limited application to the territories. *See Downes* v. *Bidwell*, 182 U.S. 244, 267 (1901) ("the judicial clause of the Constitution has no application to courts created in the territories"); *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 242 (1850) (territorial governments "are not organized under the Constitution, nor subject to its complex distribution of the powers of government"); *but cf. United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (recognizing that inhabitants of the territories are guaranteed "'fundamental' constitutional rights").

United States"). Judge Munson serves a term of ten years and, perhaps more significant, can be "removed by the President for cause." 48 U.S.C. § 1821(b)(1). Moreover, because the District Court for the Northern Mariana Islands was not created under Article III, Judge Munson's salary—although tied to that of federal district court judges, see *id.*—is guaranteed only by statute, not by the Constitution. See *Glidden*, 370 U.S. at 534 (plurality).

Where these protections are absent, the result is clear: Such judges are not Article III judges, *Northern Pipeline*, 458 U.S. at 60-64 (plurality), and they *may not* exercise the judicial power described in Article III, see *id.* at 59 ("The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."). This fundamental principle was first articulated by Chief Justice Marshall nearly 200 years ago in *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828). In that case, as a predicate to determining whether the territorial courts in Florida could hear cases arising in admiralty, the Court considered whether territorial courts exercise Article III judicial power. It concluded that, because territorial judges in Florida serve four-year terms, they do not exercise such power:

> These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution ....

Id. at 546. This principle has been repeatedly reaffirmed. See *Williams* v. *United States*, 289 U.S. 553, 581 (1933) (a

legislative court "receives no authority and its judges no rights from the judicial article of the Constitution"); *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 244 (1850) ("Congress must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but *the judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union.*") (emphasis added).

These cases reflect an understanding that the territories, and the judges of the territorial courts, hold a different place in the constitutional structure than the courts and judges established under Article III. Because "the realities of territorial government typically made it less urgent that judges there enjoy the independence ... envisioned by [Article III]," *Glidden*, 370 U.S. at 546 (plurality), the Court in *Canter* "recognized a greater flexibility in Congress to deal with problems *arising outside the normal context of a federal system*," *id.* at 547 (emphasis added).

But this flexibility has no application where, as here, an Article III court is concerned. Cf. *infra* Section II.C. The Ninth Circuit is undoubtedly an Article III tribunal and, because its judges are protected by Article III guarantees, they therefore exercise Article III power. By contrast, as this Court has repeatedly and unequivocally held, non-Article III judges may not exercise Article III power. Here, a non-Article III judge did just that. In a case before an Article III tribunal, he heard argument, "participat[ed] in the shared enterprise of appellate decisionmaking," *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 831 (1986) (Blackmun, J., concurring), and cast his vote in favor of the judgment. In short, he purported to exercise the Article III judicial power. This, the Constitution does not allow.

B. This Court Has Repeatedly Recognized Limits On The Power Of Non-Article III Judges.

The principle that non-Article III judges may not exercise the Article III judicial power of the United States is reaffirmed by a series of cases in which courts have set forth constitutional limitations on the functions that may be delegated to non-Article III judges. These cases share a common recognition that non-Article III judges may not take the place of Article III judges. See *Pacemaker Diagnostics Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.) ("If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance *and the reality* of control by Article III judges over the interpretation, declaration, and application of federal law.") (emphasis added). Non-Article III judges may sometimes carry out functions that would otherwise be undertaken by Article III judges, but only within designated limits. This stands in stark contrast to the case at hand, in which a territorial judge was handed full Article III authority.

Over the past century, this Court has repeatedly considered the extent to which judicial duties may be assigned to either non-Article III courts or "adjuncts" to Article III courts without violating Article III. See generally *CFTC* v. *Schor*, 478 U.S. 833, 847-57 (1986); *Thomas*, 473 U.S. at 582-93; *N. Pipeline*, 458 U.S. at 63-87 (plurality); *id.* at 91 (Rehnquist, J., concurring); *United States* v. *Raddatz*, 447 U.S. 667, 677-83 (1980); *Crowell* v. *Benson*, 285 U.S. 22, 48-65 (1932). This inquiry has evolved into a multi-factor test, including:

> the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the

> concerns that drove Congress to depart from the requirements of Article III.

Schor, 478 U.S. at 851; *Thomas*, 473 U.S. at 587, 589-93; see also *N. Pipeline*, 458 U.S. at 81 (plurality) ("the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court"); *Crowell*, 285 U.S. at 51. In application, this multi-factor test reveals that the more a scheme reserves these "essential attributes" for Article III courts, the greater the likelihood it will be deemed constitutional.

In *Schor*, for example, the Court applied these factors in the course of upholding a grant of jurisdiction over state common-law counterclaims to the Commodity Futures Trading Commission. It noted that the CFTC "deals only with a 'particularized area of law'"; cannot enforce its own orders; is subject to a non-deferential standard of review; and "does not exercise 'all ordinary powers of district courts.'" 478 U.S. at 852-53 (quoting *N. Pipeline*, 458 U.S. at 85). Similarly, in *Raddatz* the Court affirmed the ability of magistrate judges to handle suppression motions, reasoning that the district court's extensive supervision of the magistrate ensured that an Article III judge was making "the ultimate decision." 447 U.S. at 682-83; see also *id.* at 685 (Blackmun, J., concurring) (describing in detail district court supervision of magistrates).

By contrast—and of particular relevance here—the Court in *Northern Pipeline* struck down the broad jurisdictional grant to bankruptcy courts contained in the Bankruptcy Act of 1978. In contrast to the limited grant at issue in *Schor*, the jurisdictional grant was expansive, encompassing all civil proceedings "'*related to*'" Title 11 bankruptcy. 458 U.S. at 85 (plurality). And in contrast to *Crowell*, the courts were not limited to "statutorily channeled factfinding," and they were granted "all ordinary powers of district courts." *Id.* Moreover, review of their decisions was limited, and their

orders were final. *Id.*; see also *Schor*, 478 U.S. at 852-53 (discussing these aspects of *N. Pipeline*)

The Ninth Circuit's designation in this case plainly exceeded the delegation of authority that was struck down in *Northern Pipeline* and is, *a fortiori*, unconstitutional. Here, an Article IV territorial judge assumed the mantle of an Article III judge, with all of the accompanying duties. See 28 U.S.C. § 296 ("A ... judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned."). His jurisdiction was not limited to a "particularized area of law." *N. Pipeline*, 458 U.S. at 85 (plurality). Nor was he supervised by Article III judges; on the contrary, he was granted "all ordinary powers" of the court. *Id.* He was a co-equal participant with two other Article III judges, and combined with them to reach "the ultimate decision" in the case. *Raddatz*, 447 U.S. at 682-83. He acted, for all intents and purposes, as an Article III judge. This designation of power was patently unconstitutional.

C. Congress's Plenary Power Over The Territories Does Not Diminish The Force Of These Article III Principles.

The application of these fundamental principles to this case is wholly consistent with Congress's plenary power over the territories, for this is not a case concerning the authority of territorial courts. Rather, this case was appealed to the Ninth Circuit, an Article III court. Accordingly, the issue here is the extent to which the Constitution governs the composition of that Article III court.

To be sure, Congress has plenary power over the territorial possessions of the United States. U.S. Const. art. IV, § 3, cl. 2; see *supra* note 8. And, given Congress's power over territorial courts, it is quite possible that Congress could constitutionally have provided a different, more limited right

of appeal.[9] And it might even have created an amalgamated court, like the panel that heard cases here. But that is simply beside the point. Congress did not create such a court. And it *did* provide a right of appeal. It specifically provided that appeals from the District Court of Guam will be heard by the Ninth Circuit, 28 U.S.C. § 1294(4), an Article III court. Once jurisdiction was lodged in an Article III court, all of the structural protections that guarantee an independent judiciary—including the participation of judges with life tenure and a guaranteed salary—came into play:

> Congress has broad discretion to circumvent the federal judiciary .... But Congress may not demean or undermine the integrity of the federal courts by using them for enforcement or interpretation of federal law while denying federal judges full independence. The final balance struck is a form of quid pro quo. If Congress desires the stamp of legitimacy that Article III courts provide, it cannot simultaneously undermine that legitimacy by impeding the independence of those courts.

15 *Moore's Federal Practice*, § 100.20[3][c], at 100-41 to -42 (Matthew Bender 3d ed. Mar. 1997) (footnote omitted). Although Congress had discretion whether or not to vest jurisdiction in the Ninth Circuit, once it did so, its decision triggered the protections and requirements of Article III. Cf. *Downes* v. *Bidwell*, 182 U.S. 244, 267 (1901) ("the judicial clause of the Constitution has no application to courts *created in the territories*") (emphasis added).

This conclusion is compelled by the analogous principle that governs Congress's creation of, and control over, the

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[9] This Court has suggested, however, that denying all access to Article III courts might raise constitutional problems. *Olsen*, 431 U.S. at 204; *see also N. Pipeline*, 458 U.S. at 70 n.23 (plurality); *see generally* 1 Laurence H. Tribe, *American Constitutional Law* § 3-5, at 287-89 & nn. 103, 109 (3d ed. 2000).

"inferior" federal courts. U.S. Const. art. III, § 1. Congress was under no obligation to create lower federal courts, see *id.* ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress *may* from time to time ordain and establish.") (emphasis added); *Palmore* v. *United States*, 411 U.S. 389, 400-01 (1973), just as it need not have authorized appeals from the District Court of Guam to the Ninth Circuit. But once Congress did create such courts, it could not reduce or diminish the protections guaranteed them by Article III:

> The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice. But the Framers did not leave it to Congress to define the character of those courts—they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure.

N. Pipeline, 458 U.S. at 64 n.15 (plurality) (citation omitted). The same principle applies here. Once Congress authorized appeals from the District Court of Guam to an Article III court, then the Article III protections inherent in that court attached. The character of that court is established by the Constitution, and cannot be less than what is afforded by Article III. Because the presence of Judge Munson fundamentally changed the character of the panel of that court that heard this case, his designation to sit on the Ninth Circuit was unconstitutional.

III. UNDER THE APPOINTMENTS CLAUSE OF THE UNITED STATES CONSTITUTION, ONLY THE PRESIDENT MAY APPOINT JUDGES TO THE FEDERAL COURTS OF APPEALS.

The Chief Judge of the Ninth Circuit's decision to designate a non-Article III judge to sit on that court circumvented the Appointments Clause of the United States Constitution. Because judges on the federal courts of appeals

are "principal officers" for purposes of the Appointments Clause, they may only be appointed by the President. The appointment in this case, temporary though it may have been, ignored this constitutional directive. For this reason, too, the judgment of the panel was *ultra vires*, and must be vacated.

As one of the guarantors of the separation of powers, the Appointments Clause "is among the significant structural safeguards of the constitutional scheme." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997). Of particular relevance here, the Clause was crafted "to limit the distribution of the power of appointment." *Freytag*, 501 U.S. at 884; see also *id.* at 885 ("The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint."). By "carefully husband[ing] the appointment power to limit its diffusion," the Framers thereby "ensure[d] that those who wielded it were accountable to political force and the will of the people." *Id.* at 883-84; see also *Edmond*, 520 U.S. at 660; *Weiss* v. *United States*, 510 U.S. 163, 188 n.3 (1994) (Souter, J., concurring); *The Federalist* No. 76, at 429 (Alexander Hamilton).

To this end, the Clause creates three categories of federal job-holders. The first are "Officers of the United States"—typically referred to as "principal officers," *e.g.*, *Edmond*, 520 U.S. at 660—who must be nominated by the President and confirmed by the Senate. Second, there are "inferior Officers," the appointment of whom may be vested by Congress "'in the President alone, in the Courts of Law, or in the Heads of Departments.'" *Id.* Finally, there are "employees"—"'lesser functionaries'" who "need not be selected in compliance with ... Article II." *Freytag*, 501 U.S. at 880.

Judges of the federal circuit courts are principal officers, and must therefore be appointed by the President and confirmed by the Senate. Although this Court has never specifically addressed this question, it has assumed as much.

See *id.* at 884 (principal officers are "ambassadors, ministers, heads of departments, and judges"). Other authorities are in agreement. *Edmond*, 520 U.S. at 667 (Souter, J., concurring); *Weiss*, 510 U.S. at 191 & n.7 (Souter, J., concurring); *In re Sealed Case*, 838 F.2d 476, 483 (D.C. Cir.), *rev'd on other grounds sub nom. Morrison* v. *Olson*, 487 U.S. 654 (1988); *Thomson* v. *Robb*, 328 S.E.2d 136, 140-41 (Va. 1985); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1593, at 456 n.1 (photo. reprint 1999) (1833).[10]

As principal officers, judges of the federal circuit courts must be appointed by the President. *Pub. Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 488-89 (1989) (Kennedy, J., concurring in the judgment) (referring to the President's "duty assigned under the Constitution to nominate federal judges"); *The Federalist* No. 78, at 436 ("As to the mode of appointing the judges: this is the same with that of appointing the officers of the Union in general ....").

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[10] The criteria set forth in *Edmond* confirm that federal circuit judges are principal officers. *See Edmond*, 520 U.S. at 663 ("'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate"); *id.* at 665 (judges on the Coast Guard Court of Criminal Appeals are inferior officers because they are subject to administrative oversight, can be removed without cause, and "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers"); *see also Morrison* v. *Olsen*, 487 U.S. 654, 671-72 (1988) (setting forth factors relevant to principal officer status).

Judges of the federal circuit courts, by contrast, face no such supervision. They are independent actors. They have the power to render final decisions. And, although their judgments are subject to review in this Court, *certiorari* jurisdiction is a far cry from having one's "work ... directed and supervised." *Edmond*, 520 U.S. at 663; *see also N. Pipeline*, 458 U.S. at 86 n.39 (plurality) (existence of appellate review is insufficient to satisfy Article III). And, of course, they cannot be removed for cause.

Here, however, a territorial judge was placed on the Ninth Circuit by the Chief Judge of that court. This procedure simply does not satisfy the requirements of the Constitution. Temporary though the appointment may have been, it was impermissible. "[T]he Appointments Clause ... is more than a matter of 'etiquette or protocol.'" *Edmond*, 520 U.S. at 659 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 125 (1976) (per curiam)). It speaks with "admirable clarity," *Public Citizen*, 491 U.S. at 487 (Kennedy, J., concurring), and propounds a simple rule: Principal officers "*must* ... be appointed in the manner prescribed by [the Appointments Clause]," *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam) (emphasis added).

Allowing a member of the Judiciary to place judges on Article III courts would subvert the very purpose of the Appointments Clause. As noted above, see *supra* at 28-28, that provision was intended to limit the diffusion of the appointment power in order to ensure political accountability. Here, the appointment was made by an official with no political accountability whatsoever. Indeed, it was made by an official who is constitutionally protected from political suasion. This may be acceptable when judges appoint "inferior officers" such as court staff, *e.g.*, *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-53 (1931) (district court commissioner); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 260 (1839) (district court clerk), but it is unconstitutional where principal officers are concerned. Plainly, it is "aggrandize[ment]" by the Ninth Circuit, *Weiss*, 510 U.S. at 187-88 (Souter, J., concurring), and it frustrates the constitutional design.

This constitutional error cannot be excused by the fact that Judge Munson was previously nominated by the President and confirmed by the Senate to a *different* position. See 48 U.S.C. § 1821(b)(1). A constitutionally-valid appointment to one office does not entitle the officeholder to avoid the requirements of the Appointments Clause for every future appointment. Were this the rule, the Appointments Clause

would be neutered—nominees could move from office to office, rendering meaningless the Senate's power of advice and consent. This would vitiate the very political accountability that the Clause was intended to create.

This Court has recognized as much. In *Shoemaker* v. *United States*, 147 U.S. 282, 300-01 (1893) and *Weiss*, 510 U.S. at 172-75, the Court evaluated whether grants of additional power to existing officeholders required new appointments. To ensure that the Appointments Clause was not circumvented—while simultaneously recognizing the need to allow some flexibility in the duties that officeholders may assume—the Court developed a test of "germaneness." If an officeholder takes on duties that are "germane" to his existing office, no additional appointment is needed; however, non-germane duties require a new appointment. See *Shoemaker*, 147 U.S. at 301; see also *Weiss*, 510 U.S. at 172-75 (applying *Shoemaker*). The very premise of the germaneness test, then, is that "taking on ... nongermane duties ... would amount to assuming a new 'Offic[e]' within the meaning of Article II, and the appointment to that office would have to comply with the strictures of Article II." *Weiss*, 510 U.S. at 196 (Scalia, J., concurring in part and concurring in the judgment) (alteration in original).

In *Weiss*, for instance, the Court considered whether a military officer, already placed in office in conformance with the Appointments Clause, required an additional appointment to serve as a military judge. *Id.* at 169-70. Noting the "'specialized'" status of the military, *id.* at 174, the Court concluded that the duties of a military judge are germane to the duties of a military officer, as "all military officers ... play a role in the operation of the military justice system," *id.* at 175; see also *Williams* v. *Mercer* (*In re Certain Complaints*), 783 F.2d 1488, 1515 (11th Cir. 1986) (appointment of federal judges by Chief Judge of the Eleventh Circuit to the Investigating Committee of the Judicial Council of the Eleventh Circuit did not violate the Appointments Clause

because such service "is merely an outgrowth of their existing responsibilities").

This case, by contrast, does not present a situation in which Congress "increase[d] the power and duties of an existing office." *Shoemaker*, 147 U.S. at 301. (Indeed, it must be emphasized, *Congress* did not act here at all—the Chief Judge of the Ninth Circuit did.) Rather, the holder of one office was designated to perform the full duties of a second, distinct office that requires constitutionally-unique and vital qualifications, including life tenure and a guarantee against diminishment of salary. Accordingly, *Weiss* and *Shoemaker* demonstrate the unconstitutionality of the designation that occurred here. While some limited number of germane duties may be assigned to an existing officeholder, the assumption of a second office requires a second appointment in conformance with Article II. That did not occur here.

The unconstitutionality of this designation is highlighted by evaluating the germaneness of sitting on the Ninth Circuit to serving as a territorial judge. For even if germaneness analysis were appropriate here, sitting on the Ninth Circuit could never be "an outgrowth of" serving as a territorial judge in the Pacific Islands. The duties of those courts are categorically distinct, as they are constituted pursuant to entirely different constitutional authority. In contrast to Article III judges, who have sat by designation within Article III since the Judiciary Act of 1789, it has *never* been contemplated that judges from Article IV courts would assume the duties of Article III judges.[11] Such an assignment

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[11] For this reason, among others, the germaneness analysis has no implications for the well-established practice of sitting by designation *within* Article III. As an historical matter, it has always been understood that Article III judges could constitutionally staff other Article III courts. From the earliest days of the Republic, the "circuit courts" were jointly staffed by Supreme Court justices and district court judges. *See* Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75; *Stuart*, 5 U.S. (1 Cranch) at 308 (approving constitutionality of same). And when the federal intermediate

of duties cannot be germane, given that it violates both Title 28 and the structural guarantees of Article III.

IV. THE APPROPRIATE REMEDY IS VACATUR AND REMAND BEFORE AN APPROPRIATELY-CONSTITUTED PANEL.

A. Errors Concerning The Composition Of An Appellate Panel, As Well As Errors Involving Article III And The Appointments Clause, Require Vacatur.

Because the judgment of the Ninth Circuit was rendered by an improperly-constituted appellate panel, the actions of that panel were *ultra vires*, and must be vacated. For this same reason, "plain error" review under Federal Rule of Criminal Procedure 52(b) is inapplicable. Vacatur is mandated by the many cases in which this Court has recognized that statutory defects in the composition of a court render such a court's decisions "void," and the longstanding treatment of errors under Article III and the Appointments Clause as quasi-jurisdictional.

This principle stretches back at least as far as the turn of the last century, to *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway*, 148 U.S. 372 (1893). In that case, the Court reviewed the judgment of a Fifth Circuit panel that included a judge who had entered one of the trial court orders under review. According to the petitioner, the composition of the panel violated a federal statute, and its ruling was invalid. *Id.* at 387. Although the Court did not interpret the underlying statute—instead granting a rule "to

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appellate courts were created by the Evarts Act in 1891, both Supreme Court justices and district court judges were authorized to sit on them. Circuit Court of Appeals Act of 1891, ch. 517, § 3, 26 Stat. 826, 827. Territorial judges, though they have existed for as long as the nation, *see* William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law* (pt. 1), 61 Mich. L. Rev. 39, 45-49 (1962), have never performed this function.

show cause why a writ of *certiorari* should not issue" "to bring up and quash [the] decree" of the circuit court of appeals, *id.* at 388—it made absolutely clear that if the composition of the panel were improper, the judgment was without effect:

> If the statute made [the judge] incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error, or *certiorari*.

Id. at 387.

In *Moran* v. *Dillingham*, the Court considered the same type of error. 174 U.S. 153 (1899). Once again, the Court simply vacated the decision of the improperly-constituted court of appeals, reasoning that because "the decree in which [the judge] participated was not made by a court constituted as required by law," the judgment of the circuit court must be "*set aside and quashed, and the case remanded to that court to be there heard and determined according to law by a bench of competent judges.*" *Id.* at 158; *accord William Cramp & Sons Ship & Engine Bldg. Co.* v. *Int'l Curtis Marine Turbine Co.*, 228 U.S. 645, 650-52 (1913); see also *Frad* v. *Kelly*, 302 U.S. 312, 316, 319 (1937) (holding that parties could not stipulate to having a judge hear cases outside the scope of his statutory designation, because such a defect was "jurisdictional," and his order "was null").

Given the treatment of *statutory* errors in the composition of appellate panels, *a fortiori* is it true that analogous *constitutional* errors require vacatur. This Court has long treated errors like this one—in which officials purport to exercise power that is forbidden to them under Article III, Section 1 and under the Appointments Clause—as quasi-jurisdictional in nature. *Glidden* is of particular significance in this regard, for it concerned precisely the same claim of Article III error that is present here. In that case, as here, the

Court considered Article III issues arising out of a claim that a non-Article III judge had sat on an Article III panel. 370 U.S. at 533 (plurality). The Court reached the merits of the question—despite the fact that it was never raised below—noting that where an error "embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional.'" *Id.* at 536 (plurality).

Indeed, in numerous cases decided during the past twenty years, this Court has recognized that errors arising out of Article III and the Appointments Clause are quasi-jurisdictional, if not actually jurisdictional. In *CFTC* v. *Schor*, the Court considered an Article III challenge to a grant of authority to the Commodity Futures Trading Commission. It analogized the claimed error to a defect in subject-matter jurisdiction, noting that Article III "serve[s] institutional interests that the parties cannot be expected to protect." 478 U.S. at 851; see also *Freytag*, 501 U.S. at 878 (considering Appointments Clause challenge that was not raised below because of the role of the Appointments Clause in "preserv[ing] an[] aspect of the Constitution's structural integrity").

Likewise, in *Gomez* v. *United States*, the Court considered a challenge to the authority of a magistrate judge to conduct jury selection. 490 U.S. 858 (1989). It held that the magistrate did not have such authority and, in so doing, specifically declined to apply harmless error analysis. Noting that basic trial rights cannot be treated as harmless, it held that one such basic right is the "right to have all critical stages of a criminal trial *conducted by a person with jurisdiction to preside*." *Id.* at 876 (emphasis added).

Here, Judge Munson did not have "jurisdiction to preside" over Ms. Nguyen's and Ms. Phan's appeals. *Id.* His participation was unauthorized by statute, and violated both Article III and the Appointments Clause—in direct contravention of the structural values guaranteed by these

constitutional provisions.[12] Accordingly, the decision of the Ninth Circuit was a nullity. As constituted, the Ninth Circuit panel did not have "statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 89 (1998). Thus, just as this Court has done in a series of cases dating back over 100 years, it should vacate the judgment.

B. Even Under Plain Error Analysis, The Judgment Must Be Vacated.

1. Pursuant to Federal Rule of Criminal Procedure 52(b), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Accordingly, an appellate court may correct an error not raised below whenever there is an "(1) error, (2) that is plain, and (3) that affects substantial rights," so long as the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)) (internal brackets and quotation marks omitted). Here, each of these criteria are easily met.

The first two criteria are so obviously satisfied that they require little discussion. Chief Judge Schroeder's designation of Judge Munson was erroneous for all of the reasons set forth above, and plainly so. It violated the plain meaning of 28 U.S.C. § 292, and was forbidden by both Article III and the Appointments Clause. Given the clarity of the governing statute, and the unmistakable application of the underlying constitutional principles, this error was so manifest as to be

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[12] And, just as in *Schor* and *Freytag*, these guarantees "serve institutional interests that the parties cannot be expected to protect." *Schor*, 478 U.S. at 851. This general proposition—which applies where the constitutional values protected by Article III and the Appointments Clause are concerned—is all the more true with regard to error in the composition of an appellate panel. For unlike a trial, where attorneys are trained to notice and object to errors, an appeal is not a proceeding in which errors typically occur that require contemporaneous objection.

"plain." See *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (error is "plain" when it is "obvious").

2. The error in this case likewise satisfies the third and fourth prongs of the plain error inquiry, for the seriousness of the structural error that occurred in this case both affected petitioners' substantial rights, and calls into question the "fairness, integrity, or public reputation of [the] judicial proceedings," *Atkinson*, 297 U.S. at 160.

The substantial rights prong of the plain error test, although often focused on prejudice, see *Olano*, 507 U.S. at 734, is satisfied when an error is "structural." Because structural errors infect the very decisionmaking process, see *Johnson*, 520 U.S. at 468, they "'can be corrected regardless of their effect on the outcome,'" *United States* v. *Cotton*, 122 S. Ct. 1781, 1786 (2002) (quoting *Olano*, 507 U.S. at 735). Where, as here, a judge who renders a final decision on appeal is statutorily and constitutionally precluded from doing so, the error is undoubtedly structural.

This Court has expressly recognized that the type of error that occurred in this case is structural. In *Glidden*, the Court treated the composition of the appellate panel as "a structural defect that went to the validity of the very proceeding under review," *Freytag*, 501 U.S. at 898 (Scalia, J., concurring in part and concurring in judgment) (describing *Glidden*), and addressed these issues, despite the fact that they had not been raised before the court of appeals. Likewise, in *Freytag*, the Court concluded that a claimed "defect in the appointment of [a] Judge" was structural, for it went "to the validity of the ... proceeding that is the basis for this litigation." *Id.* at 878-79. Those precedents squarely govern this case.[13]

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[13] *Cf. Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) ("[T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features ... it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague

3. The structural nature of the error is confirmed by the cases in which this Court has determined that statutory defects in the composition of a court render such a court's decisions "void." *Am. Constr. Co.*, 148 U.S. at 387; see *supra* at 33-34. In the course of vacating the judgments in those cases, the Court expressly declined to conduct an inquiry into prejudice. The Court's absolutely explicit holding on this score in *Moran* deserves repetition in full:

> [T]he decree in which [the judge] participated was not made by a court constituted as required by law; and therefore this court, *without considering whether that decree was or was not erroneous in other respects*, orders the
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> *Decree of the Circuit Court of Appeals to be set aside and quashed, and the case remanded to that court to be there heard and determined according to law by a bench of competent judges.*

Moran, 174 U.S. at 158 (first emphasis added); see also *Glidden*, 370 U.S. at 533 (plurality) ("Article III, § 1 ... gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record."); *United States* v. *Am.-Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960) (vacating decision of en banc panel of Second Circuit because retired judge impermissibly participated; expressly declining to consider the underlying merits of the case)[14]; *William Cramp & Sons*, 228 U.S. at 650 (declining to "consider[] ... the questions urged concerning the merits of the cause"); *Landry* v. *FDIC*, 204 F.3d 1125, 1131-32 (D.C. Cir.) (Appointments Clause violation requires no showing of

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distinctions will not be judicially defensible in the heat of interbranch conflict.").

[14] *American-Foreign Steamship* is of particular note because Respondent American-Foreign Steamship Corporation argued that the petitioner had suffered no harm by the judge's actions. Br. for Resp't at 37-47, *United States* v. *Am.-Foreign S.S. Corp.*, 363 U.S. 685 (1960).

prejudice; "in a challenge to the authority of a non-Article III court on the grounds that the challenger is entitled to a court enjoying Article III's exceptional tenure provisions, the assumption that inadequate tenure may prejudice the challenger is so automatic that it usually goes unmentioned"), *cert. denied*, 531 U.S. 924 (2000); see also *Lavoie*, 475 U.S. at 828 (vacating judgment because conflicted judge cast the deciding vote; not reaching the underlying merits).

In the course of "quash[ing]" these illegitimate judgments, *Moran*, 174 U.S. at 158; *Am. Constr. Co.*, 148 U.S. at 387, the Court has recognized that such errors are so fundamental as to call into question the very integrity of the underlying judicial proceedings. In *American Construction Co.*, the Court labeled the judgment of the circuit court "unlawful." *Id.* In *William Cramp & Sons*, the Court stated that the circuit court "was virtually no court at all, because not organized in conformity to law." 228 U.S. at 652. The Court further recognized that the error in the composition of the circuit court called into question the public reputation of the judicial proceeding:

> [Because] the case was tried and disposed of below, by a court organized, not in conformity to law, but in violation of the express prohibitions of the statute, *we think it plainly results that an error of so grave a character, and involving considerations of public importance, was committed*, as to cause it to be our duty to allow the writ of certiorari, without at all considering, for the purpose of such allowance, the questions urged concerning the merits of the cause.

Id. at 650 (emphasis added).

The necessity of quashing such judgments is all the more acute in the constitutional context that presents itself here. The structural safeguards of Article III speak directly to the integrity and public reputation of the federal courts. Liberty itself depends upon an independent judiciary, *The Federalist*

No. 78, at 437-39 (Alexander Hamilton), and the structural safeguards of Article III are the primary safeguards of that independence, *id.* at 441-42; *id.* No. 79, at 442-43 (Alexander Hamilton). Permitting a non-Article III judge to sit on an Article III court erodes these foundational protections, and such an error requires that the judgment be vacated.

4. The seriousness of the error that occurred in this case is further confirmed by the inapplicability of the *de facto* officer doctrine. The very purpose of that doctrine is—under certain circumstances—to legitimate the actions of officials with deficient title. Yet that doctrine does not apply to errors like this one. The fact that the error in this case is too grave to be excused by an error-correction doctrine that relates to this precise category of error, highlights its severity.

The *de facto* officer doctrine arose out of the fear that chaos would ensue if actions taken by government officials could later be invalidated by exposing technical defects in their title to office. See *Ryder* v. *United States*, 515 U.S. 177, 180-81 (1995). Accordingly, this doctrine confers validity upon acts performed by a person acting under color of official title, even if it is later discovered that his title is deficient.

However—even leaving aside the fact that the doctrine is drifting into desuetude, see *id.* at 183-84 & n.3 (limiting earlier cases to their facts); *Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1036 n.2 (9th Cir. 1991)—it applies only to challenges arising out of minor defects in an official's title. See *Glidden*, 370 U.S. at 535-36 (plurality) (the doctrine does not apply "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business"); see also *id.* at 535 (the doctrine prevents litigants from "abiding the outcome of a lawsuit and then overturning it if adverse *upon a technicality* of which they were previously aware") (emphasis added); *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) (referring to "the technical nature of the defect").

So, for instance, in *Ball* v. *United States*, 140 U.S. 118, 128-29 (1891), the Court held that a lawfully appointed judge had *de facto* authority to sit in place of a *deceased* judge, despite the fact that he had only been designated to substitute for a *disabled* judge. In *Wright* v. *United States*, 158 U.S. 232, 238 (1895), the Court held that a duly-appointed deputy marshal was a *de facto* officer, even if his oath of office had not been properly administered. And in *Leary* v. *United States*, the Ninth Circuit concluded that a judge had *de facto* authority, despite the fact that he began a sitting by designation one day before the start of his official assignment. 268 F.2d 623, 627 (9th Cir. 1959). Here, by contrast, "the petitioner is not asking this Court to overturn his conviction 'upon a technicality,' which is the problem that the de facto doctrine is designed to alleviate." *United States* v. *Allocco*, 305 F.2d 704, 707 (2d Cir. 1962).

Given that the doctrine applies only to minor title defects, it simply cannot bar *constitutional* challenges to a judge's authority. See *Glidden*, 370 U.S. at 536 (plurality). It does not govern Appointments Clause challenges, *McDowell* v. *United States*, 159 U.S. 596, 598 (1895); see also *Freytag* v. *Comm'r*, 501 U.S. 868 (1991) (failing to apply the doctrine), and it does not defeat claims arising out of structural constitutional issues. *Glidden*, 370 U.S. at 536 (plurality); cf. *Schor*, 478 U.S. at 849, 850-51 (structural Article III protections cannot be waived).

Moreover, it has long been presumed that the doctrine can foreclose challenges to *statutory* title defects only if—as is not true here—the official already possessed appropriate judicial authority. See *McDowell*, 159 U.S. at 601 (noting that the judge at issue was already "a judge of the United States District Court, having all the powers attached to such office"); *Leary*, 268 F.2d at 627-28 (technical defects do not "bar ... the good faith exercise of judicial office by one *lawfully vested with the powers of a judge*") (emphasis added); see also *Ryder*, 515 U.S. at 182 (noting that *Ball* and

McDowell involved the "misapplication of a statute providing for the assignment of *already appointed judges* to serve in other districts") (emphasis added). Thus, although the doctrine may protect the actions of one who is "duly qualified as a judge," it cannot protect "the empty words of a mere intruder." *Johnson* v. *Manhattan Ry.*, 61 F.2d 934, 938 (2d Cir. 1932) (L. Hand, J.), *aff'd in part*, 289 U.S. 479 (1933). Invited though he may have been, Judge Munson was nonetheless just such an intruder here.

5. The necessity of treating such errors as structural is further supported by pragmatic considerations that go to the unique nature of appellate decisionmaking. Because the appellate process is collective and deliberative, and because it occurs behind closed doors, a prejudice inquiry is impracticable, for it is impossible to determine the role played by the unlawful adjudicator.

No one can doubt that judges "exchange[] ideas and arguments in deciding the case." *Lavoie*, 475 U.S. at 831 (Brennan, J., concurring); see also *Crump* v. *Bd. of Educ.*, 392 S.E.2d 579, 587-88 (N.C. 1990) ("A critical component of any quasi-judicial hearing and decision-making by a deliberative body is the give and take which occurs when group members share their observations and opinions."). Those discussions affect the ultimate shape of the court's decision, in ways both great and small. See *Lavoie*, 475 U.S. at 833 (Blackmun, J., concurring) ("the collegial decisionmaking process that is the hallmark of multimember courts [may lead] the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity").

Because these deliberations occur in secret, however, it is impossible to determine the effect of any one participant on the deliberations of a multi-member panel: "[W]hile the influence of any single participant ... can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate

disposition." *Id.* at 831 (Brennan, J., concurring). Thus, the "mere participation [of a disqualified judge] in the shared enterprise of appellate decisionmaking ... pose[s] an unacceptable danger of subtly distorting the decisionmaking process." *Id.* (Blackmun, J., concurring in the judgment); *accord Crump*, 392 S.E.2d at 588 (N.C. 1990) ("One biased member can skew the entire process by what he or she does, or does not do, during the hearing and deliberations.").[15]

Accordingly, where, as here, a non-Article III judge sits on a federal court of appeals, this unlawful arrangement constitutes "a structural defect that [goes] to the validity of the very proceeding under review." *Freytag*, 501 U.S. at 884, 898 (Scalia, J., concurring in part and concurring in

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[15] As this Court likewise recognized in *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132 (1947), it must be assumed that multi-member decisionmaking is affected by the presence or absence of panel members. In *Ayrshire*, a statute required that a tariff case be heard by a three-judge panel, but when one member of the panel fell ill, the remaining two judges issued the decision. The Court declined to uphold the judgment:

> [W]e cannot say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance. The decision reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the third judge.

Id. at 139.

For these same reasons, numerous courts—including at least six federal courts of appeals—have recognized the sheer impossibility of determining the effect of one unlawful adjudicator upon the lawfully-appointed members of that panel. *E.g.*, *Berkshire Employees Ass'n of Berkshire Knitting Mills* v. *NLRB*, 121 F.2d 235, 239 (3d Cir. 1941) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."); *see also Stivers* v. *Pierce*, 71 F.3d 732, 746-48 (9th Cir. 1995); *Hicks* v. *City of Watonga, Okla.*, 942 F.2d 737, 748-49 (10th Cir. 1991); *Antoniu* v. *SEC*, 877 F.2d 721, 726 (8th Cir. 1989); *Cinderella Career & Finishing Sch., Inc.* v. *FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Am. Cyanamid Co.* v. *FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966).

judgment). Such an error "undermines the structural integrity of the ... tribunal," *Vasquez* v. *Hillery*, 474 U.S. 254, 263-64 (1986), by permitting a judge who is beholden to the Executive Branch for reappointment to sit on a court supposedly insulated by the protections of Article III. Cf. *The Federalist* No. 78, at 441 (Alexander Hamilton) ("inflexible and uniform adherence to the rights of the Constitution ... can certainly not be expected from judges who hold their offices by a temporary commission").

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be vacated and remanded for rehearing before a properly-constituted three-member panel of that court.

Respectfully submitted,

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APPENDICES

APPENDIX A

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 9

The Congress shall have Power . . .

To constitute Tribunals inferior to the supreme Court; . . . .

U.S. Const. art. II, § 2, cl. 2

He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. III, § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. IV, § 3, cl. 2

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

APPENDIX B

STATUTORY PROVISIONS

28 U.S. C. § 292. District judges

(a) The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit. . . .

(June 25, 1948, c. 646, 62 Stat. 901; July 28, 1953, c. 253, § 3, 67 Stat. 226; Sept. 3, 1954, c. 1263, § 39(c), 68 Stat. 1240; July 9, 1956, c. 517, § 1(b), 70 Stat. 497; July 14, 1956, c. 589, § 2, 70 Stat. 532; Aug. 25, 1958, Pub. L. No. 85-755, § 3, 72 Stat. 848; July 29, 1970, Pub. L. No. 91-358, Title I, § 172(e), 84 Stat. 591; Nov. 6, 1978, Pub. L. No. 95-598, Title II, §§ 203, 204, 92 Stat. 2660; Oct. 10, 1980, Pub. L. No. 96-417, Title V, § 501(7), 94 Stat. 1742; Apr. 2, 1982, Pub. L. No. 97-164, Title I, § 109, 96 Stat. 28.)

28 U.S.C. § 451. Definitions

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The terms "district court" and "district court of the United States" mean the courts constituted by chapter 5 of this title.

The term "judge of the United States" includes judges of the courts of appeals, district courts, Court of International Trade

and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior.

The term "justice of the United States" includes the Chief Justice of the United States and the associate justices of the Supreme Court.

The term "district" and "judicial district" mean the districts enumerated in Chapter 5 of this title.

The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

(June 25, 1948, c. 646, 62 Stat. 907; Mar. 18, 1959, Pub. L. No. 86-3, § 10, 73 Stat. 9; Sept. 12, 1966, Pub. L. No. 89-571, § 3, 80 Stat. 764; Nov. 6, 1978, Pub. L. No. 95-598, Title II, § 213, 92 Stat. 2661; Oct. 10, 1980, Pub. L. No. 96-417, Title V, § 501(10), 94 Stat. 1742; Apr. 2, 1982, Pub. L. No. 97-164, Title I, § 114, 96 Stat. 29.)

28 U.S.C. § 1294. Circuits in which decisions reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: . . .

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

(June 25, 1948, c. 646, 62 Stat. 930; Oct. 31, 1951, c. 655, § 50(a), 65 Stat. 727; July 7, 1958, Pub. L. No. 85-508,

§ 12(g), 72 Stat. 348; Mar. 18, 1959, Pub. L. No. 86-3, § 14(c), 73 Stat. 10; Aug. 30, 1961, Pub. L. No. 87-189, § 5, 75 Stat. 417; Nov. 6, 1978, Pub. L. No. 95-598, Title II, § 237, 92 Stat. 2667; Apr. 2, 1982, Pub. L. No. 97-164, Title I, § 126, 96 Stat. 37.)